IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-690

BOBBY REED MAGBY,

Petitioner,

-vs-

JOHN MORAN, Director, Arizona State Department of Corrections, HAROLD J. CARDWELL, Warden, Arizona State Prison, State of Arizona,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Attorney
General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENTS

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-690

BOBBY REED MAGBY,

Petitioner,

-vs-

JOHN MORAN, Director, Arizona State Department of Corrections, HAROLD J. CARDWELL, Warden, Arizona State Prison, State of Arizona,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

CRANE McCLENNEN
Assistant Attorney
General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENTS

INDEX

TABLE OF CASES AND AUTHORITIES

AUTHORITIES

QUESTIONS PRESENTED

I. WAS THE ADMISSION IN EVIDENCE OF THE PROBATION OFFICER'S TESTIMONY REGARDING PETITIONER'S STATEMENT CONCERNING THE INSTANT OFFENSE HARMLESS ERROR, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

II. WAS THE ADMISSION IN EVIDENCE OF A MENTAL HEALTH EXPERT'S TESTIMONY REGARDING PETITIONER'S STATEMENT CONCERNING THE INSTANT OFFENSE HARMLESS ERROR, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

III. WAS THE ADMISSION IN EVIDENCE OF ANOTHER MENTAL HEALTH EXPERT'S TESTIMONY CONCERNING PETITIONER'S SANITY AT THE TIME OF THE INSTANT OFFENSE ERROR, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

IV. WAS THE ADMISSION OF PETITIONER'S STATEMENTS TO THE POLICE AND THE GIRL FRIEND ERROR, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

V. WAS THERE SUFFICIENT EVIDENCE OF GUILT, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

VI. WAS THE PREMEDITATION INSTRUCTION PROPER, AND DOES THIS ISSUE WARRANT A GRANT OF CERTIORARI?

STATEMENT OF THE CASE

Respondents submit this factual background:

During the first competency hearing to determine petitioner's ability to stand trial, the prosecutor, in that context and at that time, indicated that he would not, at trial, have Doctor Clymer relate petitioner's statements made to the doctor during the examination regarding the instant offense. (R.T., First Competency Hearing, dated May 20, 1974, at 7-10; see also the same R.T., First Competency Hearing, dated May 21, 1974 at 87-91.)

A voluntariness hearing was held concerning petitioner's telephonic statement to his girl friend. The police officer who overheard this statement testified that:

A few minutes before the statement was made, petitioner was advised of his constitutional rights (R.T., Voluntariness Hearing, dated Sept. 5, 1974, at 150-51); petitioner indicated that he understood the advisement and wanted to see (or to call) his probation officer rather than answer questions -- thus, petitioner was not interrogated at that time (id. at 152-53); petitioner proceeded to supply the police officer with some basic information (name, address, date of birth, age and telephone number) pursuant to the booking process (id. at 154-56); during the booking process, petitioner requested the opportunity to make a telephone call (id. at 156); petitioner provided the girl friend's name and her telephone number from memory (id. at 157); the telephone call occurred at approximtely 3:30 p.m. on the day of the shooting incident -- as

will be shown later, the shooting incident or the instant offense (a homicide) occurred at approximately 12:30 p.m., or 3 hours before the telephone call (id. at 158); during the telephone call, petitioner was overheard to state to the girl friend the following, which was not the product of police interrogation:

> They got me in jail on a murder charge. Because I blew some mother-fucker away. Because he was beating on my head and I don't let no mother-fucker beat on my head.

(id.); petitioner stood without any assistance from anyone or anything during the call (id. at 159); just before, during and just after the call, the police officer was able to communicate with petitioner without any problem (id. at 164); additionally, petitioner appeared to understand the officer and his surroundings (id. at 164-65), and the girl friend agreed that petitioner's speech

seemed normal; she agreed with the substance of petitioner's statement as related by the police officer. (R.T., Voluntariness Hearing, dated Sept. 6, 1974, at 256.)

Another voluntariness hearing was held concerning petitioner's statement directly to the police officer. The officer who received this statement testified that:

The statement occurred at approximately 5:30 p.m. on the day of the shooting incident -- as will be shown later, the shooting incident occurred at approximately 12:30 p.m., or 5 hours before the statement was made (R.T., Voluntariness Hearing, dated Sept. 12, 1974, at 404); petitioner was advised of his constitutional rights just before the statement was made (id. at 407); petitioner indicated that he wanted to speak with his attorney (a name was

given) before answering any questions, but there was no request for a telephone call (id. at 409-10); the officer did not ask any questions -- thus, petitioner was not given a chance to contact the named attorney at that time (id. at 410-11); however, petitioner made this statement:

> I think this thing should be considered self-defense. That dude knocked me down twice. When I got up I told him not to do it again. I got my gun and blew his fuckin' head off. God help me. That is what I done. I got my gun and blew his fuckin' head off.

(id. at 411); and lastly, petitioner appeared to understand what was going on just before, during and just after this statement (id. at 417).

During the second competency hearing to determine petitioner's ability to stand trial, Doctor Hoogerbeets testified that he examined appellant on September "19," 1974 (should be the 18th according to later trial testimony). (R.T., Second

Competency Hearing, dated Sept. 25, 1974, at 516.) The examination consisted of an hour interview. (Id. at 517.) During the interview, petitioner gave a detailed statement about the facts surrounding the homicide, less 2 minutes of alleged memory loss. (Id. at 520.)

At trial, Mr. Larson indicated that the shooting incident occurred at approximately 12:30 p.m. (R.T., Trial, dated Nov. 7, 1974, at 676-78.) Petitioner, at the time of the shooting incident, appeared to know his surroundings. (Id. at 676.)

Mr. Vogler agreed that the instant offense occurred at approximtely 12:30 p.m. (R.T., Trial, dated Nov. 8, 1974, at 865 and 869.) Mr. Vogler gave this account of the shooting incident:

> We sit here talking, me and Loser (Mr. Siegfred, one of the next two witnesses at trial), sit here talking and Bobby (petitioner)

> came around between the van and walked around Danny Clay (the victim) and tapped him on the shoulder and said a couple of words and had a shotgun in his hand raised up, pointed at his nose and the hammer was cocked. I stepped back trying to get behind Bobby and we was right next to the wrecker and then lit off with the shotgun.

(id. at 367) or

> He (petitioner) just walked around him (the victim) and tapped him or reached for him with his left hand and then Danny turned around and then Bobby just raised the shotgun, pointed it right up to his nose and then hesitated for a tenth of a second or so and then squeezed off. He hesitated enough so that I tried to get behind him and the wrecker.

(Id. at 871-72.)

Mr. Vogler added to this account indicating that: The victim, at the time of the shooting, did not have his arms raised (id. at 868); petitioner, at the time of the shooting, was not stumbling (id. at 870); petitioner only looked at the victim (id. at 871); the victim said

nothing to petitioner (id. at 872); the victim was shot while holding a bottle in one hand and nothing in the other (id. at 873), and petitioner began his fatal advance with a cocked shotgun (id. at 875).

Mr. Siegfred, another eyewitness to the homicide, related the events just prior to the shooting and corroborated Mr. Vogler's account of the shooting. There was a "scuffle" between petitioner and the victim. (R.T., Trial, dated Nov. 13, 1974, at 1095.) Thereafter, petitioner was placed in a van and, about 5 minutes later, the fatal advance began. (Id. at 1101 and 1109.) Mr. Siegfred gave this account of the shooting incident:

> As I was getting in (the van), about half turn, I heard the gun go off. I seen about that much, but I didn't see it until I was turning. About that time it was off.

(Id. at 1122.) Mr. Siegfred added to this account indicating that: The victim was

holding a bottle in one hand and nothing in the other (id.); the victim did not raise his arms (id. at 1123); the victim did not say anything to petitioner (id.); just before squeezing the trigger, petitioner said: "Don't fuck with me any more, mother-fucker." (id. at 1124); and just after squeezing the trigger, petitioner stood over the fallen body holding the shotgun (id. at 1125). The nurse who observed petitioner just after his apprehension on the day of the shooting incident indicated that petitioner was cooperative and aware of his surroundings. (R.T., Trial, dated Nov. 14, 1974, at 1421 and 142.) The girl friend related petitioner's telephonic statement. (R.T., Trial, dated Nov. 15, 1974, at 1477.) A police officer who also observed petitioner just after his apprehension on the day of the shooting

incident indicated that petitioner was "moderately" aware of his surroundings. (Id. at 1557 and 1567.) The police officer who overheard petitioner's telephonic statement related that statement. [R.T., Trial, dated Nov. 19, "1975" (should be 1974), at 105.] This officer also repeated his voluntariness hearing testimony regarding petitioner's degree of intoxication on the day of the shooting (id. at 98-104), and concluded petitioner was "aware of what was going on" and "not out of control." (Id. at 109.) The police officer who directly received petitioner's statement related that statement. (Id. at 145-A.) This officer also repeated his voluntariness hearing testimony regarding petitioner's degree of intoxication on the day of the shooting (id. at 143-45) and concluded petitioner "knew where he was, where he

had been, what was going on around him, what was requested of him." (Id. at 149.) The probation officer related petitioner's statement. (Id. at 183-84.) Doctor Gurland was called to the witness stand as a defense witness. [R.T., Trial, dated Nov. 20, "1975" (should be 1974), at 130.] He saw petitioner on March 7, 1974, for one hour and on September 17, 1974, for one hour. (Id. at 135-36.) His opinion of petitioner's sanity at the time of the offense was based on the March 7, 1974, interview only. (Id. at 139.) Defense counsel had this doctor relate petitioner's statement of the shooting incident which was made to the doctor during the interview. (Id. at 139-40.) The doctor concluded petitioner was legally insane at the time of the shooting. (R.T., Trial, dated Nov. 22, 1974, at 1751-53.) Finally, the doctor

indicated that petitioner's "not overly detailed" statement of the shooting incident was sufficient to form the opinion of legal insanity. (Id. at 1807, 1810-11 and 1833.)

On rebuttal, for purposes of having a medical expert know of a couple of petitioner's prior bad acts, two police officers testified about an armed robbery with a cigarette lighter that looked like a gun and an obstructing justice episode with an assault on a police officer -- the prosecutor sought this testimony only as foundation for an exhibit (petitioner's statement concerning the armed robbery); however, defense counsel went into specifics of the armed robbery and the prosecutor followed suit with respect to the obstructing justice episode. (R.T., Trial, dated Nov. 26, 1974, at 1861-73, 1879-1900 and 1919.)

Doctor Clymer saw petitioner on February 28, 1974, for 1 hour. (Id. at 1904.) His opinion of petitioner's sanity at the time of the offense was based solely upon this interview. (Id. at 1908-09.) The doctor, without objection, related petitioner's statement of the shooting incident, which was made to the doctor during the interview. (Id. at 1921.) The doctor concluded petitioner was legally sane at the time of the shooting. (Id. at 1924.)

Doctor Hoogerbeets was to be the next rebuttal medical expert, but petitioner objected -- the trial court allowed the doctor to testify because the testimony was relevant; there was no surprise and the objection was untimely. (R.T., Trial, dated Nov. 27, 1974, at 2061.) Doctor Hoogerbeets saw petitioner on September 18, 1974, for 1 hour. (Id. at

2064-65.) This doctor based his opinion upon the interview and other materials including numerous hypothetical facts in evidence, which did not alter the opinion and which were supplied by the prosecutor based upon the testimony of the other two medical experts and by defense counsel based upon the other experts' testimony and his interview with the doctor. (Id. at 2082, 2087-2100 and 2103-05.) This doctor concluded petitioner was legally sane at the time of the shooting. (Id. at 2079.) Additionally, this doctor related, without specific objection, petitioner's statement of the shooting incident, which was made to the doctor during the interview. (Id. at 2075-77.)

Lastly, Doctor Hoogerbeets indicated that his interview for competency to stand trial provided him with the necessary information to offer an opinion on sanity

at the time of the offense. (R.T., Trial, dated Nov. 29, 1974, at 34-35.)

ARGUMENT

I

THE ADMISSION IN EVIDENCE OF THE PROBATION OFFICER'S TESTIMONY REGARDING PETITIONER'S STATEMENT CONCERNING THE INSTANT OFFENSE WAS HARMLESS ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

The decisions of the Ninth Circuit Court of Appeals, the Arizona District Court, and the Arizona Supreme Court comport with all decisions from this Court interpreting the constitutional rights of persons accused of crime, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. None of the issues presented by the instant writ warrant a grant of certiorari. Some of the issues presented are not properly before this Court. Finally, this introductory paragraph will not be

repeated before each argument, but is incorporated thereto by reference.

Petitioner first contends that the admission of the probation officer's testimony was too damaging to be properly deemed harmless. Respondents submit that, compared to the other trial evidence, the challenged testimony is rendered wholly innocuous.

Through the probation officer, these actions by petitioner were referenced: he went to the truck, obtained the weapon, approached the victim, and shot the victim. See Petitioner's Writ, at 15. The two eyewitnesses (Mr. Vogler and Mr. Siegfred) related these same actions. The statements to the police and the girl friend also referenced these actions. The three previous court decisions properly held the challenged testimony to be cumulative. The error was harmless.

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

However, petitioner also contends that errors of this nature cannot be harmless regardless of other evidence. Respondents posit that this contention is not properly before this Court. The impossibility of harmless error issue, contrary to petitioner's representation, has not been raised or ruled upon by the prior three courts involved in this matter. See the three court decisions contained in Petitioner's Writ (the Arizona District Court's footnote should be noted in particular). This Court should not address this sub-issue.

ARGUMENT

II

THE ADMISSION IN EVIDENCE OF A MENTAL HEALTH EXPERT'S TESTIMONY REGARDING PETITIONER'S STATEMENT CONCERNING THE INSTANT OFFENSE WAS HARMLESS ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

Petitioner claims that the admission of the mental health expert's testimony was also too prejudicial to be considered harmless error. Again, respondents submit that, when placed next to other trial evidence, the challenged testimony becomes totally harmless.

The mental health expert related to the jury even less of petitioner's actions than had the probation officer. Only the shot was related. (It should be noted that petitioner's recollection was crucial to the insanity defense; thus, petitioner opened certain doors by having his expert testify about a nonspecific statement of

petitioner -- the insanity defense also required no objection when the challenged testimony was given.) Clearly, the testimony of the two eyewitnesses and the statements to the police and the girl friend thoroughly covered all aspects of the shot. The three previous court decisions properly held the challenged testimony to be cumulative. The error was harmless. Chapman v. California, supra.

Once again, petitioner raises the specter of impossibility of harmless error. Again, respondents rely upon improper posture. The impossibility of harmless error issue is not properly before this Court. Contrary to petitioner's assertion, it has not been raised or ruled upon by the prior three courts involved in this matter. See the three court decisions contained in

Petitioner's Writ (the Arizona District Court's footnote should be noted in particular). This Court should not address this sub-issue.

ARGUMENT

III

THE ADMISSION IN EVIDENCE OF ANOTHER MENTAL HEALTH EXPERT'S TESTIMONY CONCERNING PETITIONER'S SANITY AT THE TIME OF THE INSTANT OFFENSE WAS NOT ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

Petitioner further contends that it was error for a mental health expert, who examined petitioner for competency to stand trial, to testify about petitioner's sanity at the time of the offense. Assuming a federal constitutional question is presented, there was no error.

Petitioner makes no claim that there was no basis for the opinion. Indeed, there was such a basis. The necessary foundation was readily provided because

the degree of petitioner's recollection was the central issue with respect to competency to stand trial and sanity at the time of the offense. As pointed out in Birdsall v. United States, 346 F.2d 775 (5th Cir. 1965), many a discovery occurs in the search for something else. The challenged testimony came as no surprise to petitioner (there was a pretrial interview). There was no error.

ARGUMENT

IV

THE ADMISSION OF PETITIONER'S STATEMENTS TO THE POLICE AND THE GIRL FRIEND WAS NOT ERROR; THERE IS NO REASON THAT THIS ISSUE WARRANTS A GRANT OF CERTIORARI.

Petitioner further claims that his statements were the product of his intoxication solely. While the trial evidence displayed a degree of intoxication, three courts have reviewed that evidence and concluded that the

degree of intoxication was not sufficient to render the statements involuntary. Respondents submit that the facts show a series of spontaneous declarations that were the product of a rational intellect and free will. See Townsend v. Sain, 372 U.S. 293, 83 s.Ct. 745, 9 L.Ed.2d 770 (1963). Since the statements were not the product of intoxication, there was no error.

ARGUMENT

V

THERE WAS SUFFICIENT EVIDENCE OF GUILT; THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI.

Petitioner also contends that the evidence was not sufficient. Respondents submit that there was sufficient evidence; however, a preliminary matter must be dealt with first. Petitioner weaves several challenges to the instructions into this issue. These challenges are not

properly before this Court; they have not been raised or ruled upon by the prior three courts. See the three court decisions contained in Petitioner's Writ. This Court should not address these sub-issues. Moreover, even assuming that a federal constitutional question is presented, the challenged instructions have passed constitutional muster. See Bustamante v. Cardwell, 497 F.2d 556 (9th Cir. 1974).

With respect to the sufficiency of the evidence, the testimony of the two eyewitnesses and petitioner's statements to the police and the girl friend permitted the jury to resolve all the issues at trial into a finding of first degree murder. The facts allowed a rational fact finder to find the presence of malice aforethought (express), the presence of premeditation (not

instantaneous), the lack of provocation (but the presence of a cooling off period), the lack of self-defense, the lack of insanity, and the lack of intoxication (to remove malice). The evidence was more than sufficient.

ARGUMENT

VI

THE PREMEDITATION INSTRUCTION WAS PROPER; THIS ISSUE DOES NOT WARRANT A GRANT OF CERTIORARI.

Petitioner also claims, as a final contention, that the premeditation instruction is prosecution slanted. The instruction was proper. Even assuming a federal constitutional question, the instruction has passed constitutional muster. See Bustamante v. Cardwell, supra. Two final points: (1) viewing the instructions as a whole places the challenged instruction into the proper context, and (2) petitioner's

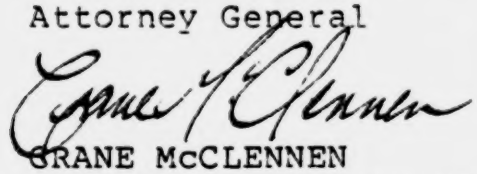
premeditation was far from instantaneous -- he went to his truck, obtained his weapon, approached his victim, and then pulled the trigger.

CONCLUSION

Since the resolution of those issues properly before this Court conforms with the existing law of the land, there are no proper grounds for a grant of certiorari. For the foregoing reasons, respondents respectfully request this Court's denial of the requested grant of certiorari.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENTS